Supreme Court, U. S.
FILED
DEC 22 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-8721

ZORA H. GILLAM,

Respondent,

v.

THE ADMIRAL CORPORATION,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, the Admiral Corporation, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Sixth Circuit entered on September 25, 1975, reversing the judgment of the District Court of the United States for the Southern District of Ohio. The said appeal in the United States Court of Appeals for the Sixth Circuit was docketed as number 74-1398.

OPINION OF THE COURTS BELOW

The United States District Court for the Southern District of Ohio entered its Order January 9, 1974 (1a) granting petitioner's Motion for Judgment Notwithstanding the Verdict

and, pursuant thereto on January 17, 1974, entered its Order Amending the Judgment Entry. (7a) The Opinion of the Court of Appeals for the Sixth Circuit is recorded in 523 F. 2d *102* (10a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 5, 1975. (23a). The Order of that court denying rehearing and hearing en banc was entered November 12, 1975. (25a) The jurisdiction of this Court is envoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals, in reversing the judgment of the District Court as to punitive damages and attorney fees, failed to follow the law of Ohio as expressed by the Supreme Court of Ohio.

Does the decision of the Court of Appeals constitute the levying of a forfeiture or penalty without due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C. Constitution Article IV. Section 1.

"Full faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State."

U.S.C. Constitution Amendment V.

". . . nor be deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

This litigation originated as a diversity action filed by Zora H. Gillam against The Admiral Corporation for injuries sustained in a fire in Mrs. Gillam's home in Cincinnati, Ohio, allegedly resulting from a defective condition in a color television set manufactured by Admiral. In September, 1972, two years after commencement of the action, Plaintiff was permitted, over objection, to amend her Complaint to seek punitive damages and attorney fees.

In a bifurcated trial the issue of liability was found in favor of Plaintiff. The issue of damages was then tried to the same jury and defendant's motion for directed verdict on the issue of punitive damages and attorney fees was taken under submission and verdicts were returned in Plaintiff's favor for $125,000.00 compensatory damages, $100,000.00 punitive damages and $50,000.00 attorney fees. Defendant filed a motion for judgment notwithstanding the verdict as to punitive damages and attorney fees. That motion was granted by the District Court (1a) and the judgment amended accordingly (7a). Thereafter the compensatory damages of $125,000.00 were paid by Defendant and an Entry of Satisfaction placed of record. (9a). An appeal was taken by Plaintiff to the Court of Appeals for the Sixth Circuit and that Court reversed the judgment of the District Court and reinstated the judgment for Plaintiff as to punitive damages and attorney fees.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

First Point: The Decision of the Court Below Reversing the Judgment of the District Court Violates the Provisions of Article IV of the Constitution of the United States in that it fails to Give Full Faith and Credit to the Law of the State of Ohio as Expressed by Decisions of the Supreme Court of that State.

This was an action having as its jurisdictional basis diversity of citizenship. There was no reliance nor basis for reliance

upon Federal law as to any substantive issue in the case. State law was controlling as to all issues including the collectibility of punitive damages and attorney fees. It has at no time been suggested that any law other than the law of Ohio should control that question.

The law of Ohio as it relates to the availability of punitive damages in a civil action is, we submit, well settled. The controlling precedent on that issue is stated by the Supreme Court of Ohio in the first paragraph of the syllabus in *Smithhisler* v. *Dutter*, 157 O.S. 454 as follows:

> "In tort actions the question of punitive damages may not ordinarily be submitted to a jury in the absence of actual malice."

It is respectfully submitted that the Court of Appeals in the instant case either failed to recognize the *Smithhisler* statement as the controlling Ohio law or misinterpreted and extended the *Smithhisler* statement by reading into it a possibility that malice may be inferred. It would appear. in fact, that the Court of Appeals did both.

The status of the above quoted statement from *Smithhisler* as the law of Ohio rests upon the long recognized rule of *stare decisis* in this state set down by the Supreme Court of Ohio in 1858 as follows:

> "A syllabus of the points decided by the Court in each case, shall be stated, in writing, by the Judge assigned to deliver the opinion of the Court, which shall be confined to the points of law, arising from the facts of the case, that have been determined by the Court. The syllabus shall be submitted to the Judges concurring therein, for revisal, before publication thereof; and it shall be inserted in the book of reports without alterations, unless by the consent of the Judges concurring therein." 5 Ohio St. (vii)

This statement of policy has been continually recognized and codified to and including the present Ohio Revised Code

Section 2503.20. It has also been the subject of repeated judicial recognition of which the following is an example:

> "It has long been the rule of this Court that the syllabus contains the law of the case. It is the only part of the opinion requiring the approval of all the members concurring in the judgment. Where the Judge writing the opinion discusses matters or gives expression to his views on questions not contained in the syllabus, it is merely the personal opinion of that Judge." State ex rel *Donahey* v. *Edmondson*, 89 O.S. 93

This Court had occasion to recognize Ohio's judicial policy which recognizes the syllabus as the official opinion of the Court in the case of *Perkins* v. *Benquet Consolidated Mining Company*, 342 U.S. 437.

It must therefore be said unequivocally that the Ohio law referable to the availability of punitive damages is that stated in *Smithhisler* v. *Dutter* which has at no time been overruled, limited or otherwise qualified by any subsequent syllabus of any Ohio Supreme Court case.

The fact that the Court of Appeals in this case failed to recognize that prevailing Ohio rule is obvious from the manner in which it made reference to and quoted from the case of *Columbus Finance, Inc.* v. *Howard*. The Court of Appeals characterized the *Columbus Finance* case as holding ". . . that Ohio law required a finding of fraud, insult, or malice to sustain punitive damages, but that 'actual malice may be inferred from conduct and surrounding circumstances'" (19a). In fact, the only statement of Ohio law referable to punitive damages in *Columbus Finance* was the first paragraph of the syllabus.

> "In an action for wrongful execution, actual malice, fraud or insult upon the part of the wrongdoer must be shown in order to justify an award of punitive damages."

The qualifying statement which was quoted by the Court of Appeals was not contained in the syllabus but in the opinion

and was, therefore, to use the language of the *Donahey* case, "merely the personal opinion of that Judge."

Further, it should be called to the Court's attention that the Court of Appeals' only reference to *Smithhisler* indicates that it was treated by the Ohio Supreme Court in *Columbus Finance* "... as an exception to the general rules regarding punitive damages, to be applied in cases involving alienation of affection of a spouse." (20a) In fact, the "treatment" given *Smithhisler* in the *Columbus Finance* opinion was the following:

> "The parties disagree as to the general description of conduct which constitutes malice sufficient to sustain an award of punitive damages. Appellee contends that an award of punitive damages is proper only if 'actual malice' on the part of the wrongdoer is shown. There is case law which directly supports that position. *Davis* v. *Tunison,* supra; *Pickle* v. *Swinehart* (1960), 170 O.S. 441, 166 N.E. 2d 277. *See, also, Smithhisler* v. *Dutter (1952), 157 Ohio St. 454, 105 N.E. 2d 868, in which this court recognized that actual malice is ordinarily required in order to sustain an award of punitive damages, but that an exception is made for cases involving alienation of affection of a spouse.*" (Emphasis added)

Beginning with *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 this Court has established and continuously enforced the duty upon all Federal Courts in diversity actions to apply to the issue therein the applicable State law *(New York Life Insurance Company* v. *Jackson,* 304 U.S. 261; *Rosenthal* v. *New York Life Insurance Company,* 304 U.S. 263; *Hudson* v. *Moonier,* 304 U.S. 397; et seq.). This judicial duty was well expressed in *West* v. *American Telephone and Telegraph Company,* 311 U.S. 223 in which this Court called for the application of Ohio law by the federal court:

> "State law is to be applied in the Federal as well as State Courts and it is the duty of the former in every case to ascertain from all the available data what the State law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the State rule may have departed from prior decisions of the Federal Court."

It is obvious that the Court of Appeals in the present case failed to observe and follow this precept.

Second Point: The Decision of the Court Below in Reversing the Judgment of the District Court Violates the Provisions of the Fifth Amendment to the Constitution of the United States in that it Permits the Levying of a Forfeiture of Penalty and the Taking of Property Without Due Process of Law.

In Ohio as in most other jurisdictions punitive damages do not have as their purpose the providing of compensation for the injured litigant. Their purpose is to punish or penalize the wrongdoer who has been guilty of some malicious act. Punitive damages do, therefore, in fact, constitute a penalty or forfeiture levied against the Defendant for much the same purpose and in much the same manner that a fine or penalty is assessed against a Defendant in a criminal case.

One very significant difference exists, however, between the assessment of punitive damages in a civil case and the levying of a fine or forfeiture in a criminal matter. In the latter situation the statute creating the crime must define those acts which constitute violation of it with sufficient clarity and certainty as to apprise any potential Defendant of those acts which will and those acts which will not render him subject to the assessment of the prescribed punishment.

By contrast, the Court of Appeals in the present case has said that punitive damages may be assessed against a Defendant in any situation in which the evidence would permit the jury "to infer" malice on the part of the Defendant. It is respectfully submitted that such a rule affords no definition of the acts to be punished. What the rule in fact does is to charge the jury not only with the responsibility of finding

whether or not a punishable act has been committed but also of determining and defining what is a punishable act.

A second significant distinction between a criminal fine or penalty on the one hand and the assessment of punitive damages in a civil action on the other lies in the fact that a criminal statute, in addition to defining the criminal act, must also establish the punishment that will or may be leveyed against a Defendant found guilty of violation. Such certainly is not the case in the assessment of punitive damages. The jury in the civil action is left entirely without guidelines in assessing punitive damages. It is left, in fact, with nothing but unbridled speculation assisted by the imagination of Plaintiff's counsel whose client will be the beneficiary of the jury's largess.

We do not suggest that a manufacturer's actions should be exempt from supervision or that he should be immune from penalty if he has acted in a manner that would make penalty appropriate. We do submit, however, that every person, firm or corporation is entitled to an understandable definition of those acts which are punishable and knowledge of what that punishment will be. The solution to those problems must be found through legislation. That fact has been recognized and Congress has undertaken the establishment of control, supervision and penalty. As an example we direct the Court's attention to the Consumer Product Safety Act, Public Law 92-573, enacted by Congress October 27, 1972. (15 U.S.C. Sec. 2051).

It is argued that one of the functions of punitive damages is to deter the Defendant and, by example, others similarly situated from engaging in those activities for which punitive damages are assessed. We respectfully suggest that Congress has undertaken that task and that the assessment of punitive damage under these circumstances would, at best, be duplicative of the congressional effort.

Third Point: The Issue Herein Presented As to the Collectibility of Punitive Damages from the Manufacturer of an Allegedly Defective Product Is of General Interest to the Entire Manufacturing Industry.

The effect of the decision by the Court of Appeals in this case and the need for review and statement by this Court is of such magnitude as to be incapable of exaggeration. If allowed to stand, the decision of the Court below subjects every manufacturer of every product to a very real threat of financial annihilation.

The increased activity in products liability litigation over the past ten to fifteen years is a well recognized fact and can be described, in many respects, as expansive or even explosive. The theories of liability to which manufacturers have been subjected have gone first from warranty to negligence; then from negligence to warranty without privity; then from warranty without privity to strict liability without negligence. Along the way products liability law has assumed such additional elements as failure to warn, failure to guard against injury in the event of accident and the like. At the same time the defenses available to the manufacturer have been catastrophically eroded. In many jurisdictions recognizing strict liability it avails the Defendant nothing to prove the exercise of ordinary case or that the Plaintiff was contributorily negligent or that the Plaintiff voluntarily assumed a known risk.

At the same time that the theory of liability against manufacturers was being expanded and the defenses available to them were being diminished the awards for compensatory damages were multiplying as much as a hundred fold. Still, as staggering as the availability and amount of compensatory awards had become, the manufacturing community retained some hope of guarding itself against disaster by instituting additional safeguards in design and quality control on the one hand and reserving and/or insuring against claims on the other. So long as claimants were required to prove the existance of a defect and so long as the damages awarded

had to be commensurate with the injuries suffered, manufacturers still might be capable of dealing with the problem within the limitations of fiscal possibility.

The allowance of punitive damages, as permitted by the Court of Appeals in this case, creates a new and virtually uncontrollable threat. It is entirely predictable that, if the principle as expressed by the Court below is permitted to become a part of the body of law governing products liability cases, many of the thousands of pending cases will be amended to pray for punitive damages and that that prayer will become a routine part of all new filings. Few Plaintiffs will pass up the opportunity for this bonanza and their attorneys will certainly feel compelled to seek the attorney fees that are an available adjunct to a punitive damage prayer.

With every product that a manufacturer produces, in addition to bearing the burden of complying with the many industry and governmental standards, and in addition to bearing the burden of foreseeing every possible circumstance under which any user or member of the public might sustain any injury, the manufacturer would further be confronted with the fear and threat that some jury, permitted the luxury of speculation, might infer some recklessness or wantonness that would pave the way for a punitive damage award. The insidiousness of this threat, aside from its basis in inference, lies in the fact that it bears no relation to the injuries sustained by Plaintiff and is limited only by the financial condition of the Defendant and therefore carries with it, in each and every case, the possibility of financial ruin.

The availability of punitive damages would have additional and seriously detrimental effects upon all manufacturers. The spector of the inferences that a jury might draw from any and every word and deed documented in its files would, of necessity, create such a deterent to the exchange and discussion of new ideas as to impede innovative and improve development. Every change discussed would have in it the dual seed of incriminating the earlier design if adopted or the ignoring of a preferred method if rejected.

Judge Friendly of the United States Court of Appeals for the Second Circuit had occasion to consider the availability of punitive damages in a products liability situation in the case of *Roginsky* v. *Richardson-Merrell, Inc.*, 378 Fed 2d 832. The District Court in that case permitted a punitive damage award in favor of Plaintiff who had sustained cataract damage as the result of taking medication developed and marketed by Defendant. Judge Friendly reversed the jury verdict as to punitive damages. The majority opinion is a lengthy one but, we submit, deserves review for the thoroughness with which it treats the question here presented. The depth of consideration and careful treatment given this question by Judge Friendly is, we submit, in stark contrast to the Court of Appeals opinion in the present case. Clearly, Judge Friendly recognized the judicial duty imposed upon him to follow the law of the State. At page 841 of the Opinion he states:

> ". . . the *Erie* Doctrine wisely prevents our engaging in such extensive lawmaking on local tort liability, a subject which the people of New York have entrusted to their legislators and, within appropriate limits, to their own Courts, not to us.

Exercising judicial restraint Judge Friendly, at page 837 of the Opinion, recognized the magnitude of the question:

> "Given our limited capacity as predictors of New York law, we would prefer to avoid decision of such a weighty and difficult issue, with wide ramifications as to other products, even if we permissibly can."

The present case is no less weighty nor is it infected with any less significant ramifications as to other products and other manufacturers than was the *Roginsky* case.

The issue submitted certainly is not limited to the parties to this case. Its effect will be felt by all manufacturers of all products not only nationwide but worldwide. It is a question that deserves and entreats this Court's attention.

CONCLUSION

The Court of Appeals failed to observe its judicial duty to recognize and follow the law of Ohio as stated by its highest Court. In so doing it engrafted upon body of products liability law a principle which threatens all manufacturers of all products to unlimited punitive damage awards which would threaten financial annihilation.

Respectfully submitted,

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. 4449

ZORA H. GILLHAM,

Plaintiff,

v.

THE ADMIRAL CORPORATION,

Defendant.

ORDER

(Filed January 9, 1974)

This matter is before the Court on defendant's motion to arrest from the jury evidence with reference to punitive damages and to enter judgment in its favor on that issue. The motion was seasonably made and was taken under submission by the Court in accordance with Rule 50(b) of the Federal Rules of Civil Procedure.

The trial of the above matter was bifurcated in accordance with Rule 42(b) of the Federal Rules of Civil Procedure. After a jury verdict in favor of the plaintiff on the issue of liability, the jury considered the matter of damages. It assessed as damages the sum of One Hundred Twenty-five Thousand Dollars ($125,000.00) compensatory damages; One Hundred Thousand Dollars ($100,000.00) punitive damages; and Fifty Thousand Dollars ($50,000) reasonable attorney fees. The motion of defendant will be considered as relating only to the award of punitive damages and the award of reasonable attorney fees.

This is a products liability case. The plaintiff sustained burns fighting a fire in her apartment which originated in a television set manufactured by the defendant. Evidence was presented that prior to the fire, defendant had notice of approximately 91 complaints regarding smoke or fire in television sets similar to that purchased by the plaintiff. These complaints extended over a substantial period of time. Evidence was likewise presented of a potential fire hazard in a component part known as the horizontal output transformer. Further evidence was presented that safety precautions intended to confine a potential fire within the horizontal output transformer were ineffective and that this, too, was within the knowledge of the defendant.

The evidence can reasonably be interpreted to indicate that the defendant was negligent and even grossly negligent in its design of the television set, in its subsequent activities, and in its failure to warn customers of the potential fire hazard. The sole question before the Court, however, is whether such evidence viewed in a manner most favorable to the plaintiff, entitled the plaintiff to an award for punitive damages. The Court thinks not.

There are few cases on the subject of punitive damages in product liability cases. Neither the courts of Ohio nor the United States Court of Appeals for the Sixth Circuit have addressed themselves directly to this question. For assistance we must turn to the case of *Roginsky* v. *Richardson-Merrill, Inc.*, 378 F.2d 832 (2d Cir. 1967). The classical terms of "well-reasoned" and "well-considered" only partially describe the opinion of Chief Judge Friendly. It is all that, but even more it is a definitive discussion of punitive damages as they relate to product liability cases. The *Roginsky* case involves the production of a drug known as MER29. This drug was marketed by the defendant therein to reduce elevated cholesterol in the blood stream. While it was an exceptionally effective drug, it apparently also produced as a side effect, cataracts in some of its users. The plaintiff Roginsky sought

punitive damages as well as compensatory damages. The Court held that under New York law, the moral culpability which supports punitive damages for non-intentional torts is "utter recklessness or wanton, malicious, gross, or outrageous conduct." While it is only of secondary importance, the conduct of the Richardson-Merrill Co. included a non-disclosure of certain clinical experiments as well as a deliberate falsification of others.

What, then, is the standard under Ohio law for the imposition of punitive damages? The courts of this state have long recognized that punitive damages may in proper cases be recovered. A recognition of it appeared first in *Roberts* v. *Mason*, 10 Ohio St. 277 (1859). The Supreme Court of Ohio cited and followed *Roberts* v. *Mason* in *Saberton* v. *Greenwald*, 146 Ohio St. 414 (1946). In that case, the Supreme Court reversed a lower court which had denied punitive damages and held: "In action to recover damages for tort which include the ingredients of fraud, malice or insult, the jury may go beyond the rules of mere compensation of the party aggrieved and award exemplary or punitive damages." Subsequently, the Supreme Court in *Smithhisler* v. *Dutter*, 157 Ohio St. 454 (1952), commented upon a dissent of Judge Hart in the *Saberton* case and pointed out that there was no division upon the following statement: "This court has over the years recognized the propriety of submitting to a jury the question of assessment of punitive damages in certain tort cases where the defendant's wrongdoing *has been intentional and deliberate or has the character of outrage frequently associated with crime.*" [Emphasis added] In *Rogers* v. *Barbera*, 170 Ohio St. 241, the Supreme Court of Ohio observed that conduct could be either "wanton" or "reckless" and still not have been actuated by malice or ill will.

None of the foregoing involves product liability cases. So far as this Court can determine, neither its research nor that of plaintiff and defendant have disclosed any Ohio cases. An

annotation in 29 A.L.R. 3d 1071 lists only three cases: one of which is from Alabama and the other two cases concerning MER29. They are the *Roginsky* case above mentioned and the *Toole* case from the state courts of California.

The United States Court of Appeals for the Sixth Circuit has considered punitive damages in other contexts. In the case of *U.S. Steel Corp.* v. *Fuhrman*, 407 F.2d 1143 (1969), that Court reversed an award of punitive damages in a situation involving a collision of two vessels on Lake Michigan. It should be noted that the opinion of the trial court reported in 276 F. Supp. 163 detailed a fact situation of such apparent disregard for the lives and safety of seamen as to border upon criminal negligence. In a recent case dealing with trade secrets, that Court sustained an award of punitive damages. *W. R. Grace & Company* v. *Hargadine*, 392 F.2d 9 (1968).

In speaking for a unanimous court, Judge Edwards cited and followed the view in *Aladdin Mfg. Co.* v. *Mantle Lamp Co.*, 116 F.2d 708 (7th Cir. 1941) that: "Exemplary damages are allowed against a tort feasor which acts are intentionally fraudulent, malicious, wilful or wanton." Admittedly, neither *Grace*, *U.S. Steel*, nor *Signer* involved product liability, but all indicate a consistent view of punitive damages conceptionally equivalent to that of the Second Circuit in the *Roginsky* case. As recently as 1972 the United States Court of Appeals for the Sixth Circuit again stated its views on this subject. In *Signer* v. *First National Bank & Trust Company of Covington*, 455 F.2d 382 (1972), the Court affirmed the trial court's denial of punitive damages and stated: "Such damages are given only on account of the wanton, reckless, malicious or offensive character of the acts complained of."

It may well be that the Admiral Corporation took a cavalier attitude toward the complaints leveled at its product. The evidence of such complaints was primarily the consumer letters and responses by officials of Admiral. The letters of complaint were admitted into evidence in accordance with

the recommendation of the United States Court of Appeals for the Fourth Circuit in *Gardner* v. *Q.H.S., Inc.*, 448 F.2d 244. No evidence of fire subsequent to that which injured the plaintiff was admitted and plaintiff elected not to present evidence supporting the letters of complaint. Not all of the incidents related involved the transformer, nor did all of the complaints involve fires. There is no doubt, however, that the Admiral Corporation relied on its initial design of the television set and made no effort to warn any of its dealers or customers that a potential hazard did exist. Breach of implied warranty and failure to warn were properly determined by the jury against the defendant.

Something more must be embraced by the words such as "utter recklessness", "wantonness", "outrageous conduct", etc. While there are abvious dictionary distinctions among these words, they all connote the same general conduct. There must be acts so shocking that one is left with a feeling of outrage and a determination to punish. If a comparative concept must be selected, it is that of punishment for violation of law rather than recompense for a negligent act.

It may be that some court will find an objective standard against which conduct can be judged for determining that which warrants the imposition of punitive damages. Until that time arrives, trial courts can only rely upon the representative words that have been used traditionally in an effort to describe what is basically an indescribable concept.

When the evidence of conduct of the Admiral Corporation is considered in terms of the conduct of the Richardson-Merrill Company in *Roginsky* and in terms of the conduct of U.S. Steel in *Fuhrman*, it does not assume proportions that invite either punishment or example. Accordingly, the motion of defendant will be GRANTED and judgment n.o.v. on the issue of punitive damages will be GRANTED in defendant's favor.

Since reasonable attorney fees may only be granted in a situation where punitive damages are awarded, *Davis* v. *Tunison*, 168 Ohio St. 471 (1959), judgment n.o.v. as to such attorney fees will likewise be GRANTED.

The parties are directed to present to the Court within ten (10) days of the date of this Opinion, a judgment order consistent with the terms hereof.

/s/ CARL B. RUBIN
United States District Judge

It is so ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CIVIL ACTION No. 4449

ZORA H. GILLHAM,

Plaintiff,

v.

THE ADMIRAL CORPORATION,

Defendant,

ORDER AMENDING JUDGMENT ENTRY

(Received January 17, 1974)

Judgment having been entered herein on December 19, 1973, on jury verdicts of compensatory damages in the amount of $125,000.00, punitive damages in the amount of $100,000.00 and attorney fees in the amount of $50,000.00 to the Plaintiff and the Court, by Order of January 9, 1974, having granted Judgment NOV in favor of the Defendant on the issue of punitive damages and having granted Judgment NOV in favor of the Defendant as to attorney fees,

NOW, THEREFORE, the Judgment entered December 19, 1973, is hereby amended as follows:

Judgment is hereby entered in favor of the Plaintiff and against the Defendant in the amount of $125,00.00 as compensatory damages, together with her costs herein expended, and

Judgment is hereby rendered in favor of the Defendant and against Plaintiff, pursuant to this Court's Order of January 9, 1974, on the issue of punitive damages and in accordance

therewith the verdict of the jury rendered December 19, 1973, is hereby set aside insofar as it awarded punitive damages and attorney fees in favor of the Plaintiff.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Civil Action Nos. 4449 & 7674

ZORA H. GILLHAM,
Plaintiff,

v.

THE ADMIRAL CORPORATION,
Defendant,

ENTRY OF SATISFACTION

(Filed March 1, 1975)

Judgment having been heretofore rendered on January 22, 1974, in favor of Plaintiff and against Defendant for compensatory damages in the sum of One Hundred Twenty-Five Thousand and 00/100 ($125,000.00) Dollars; and said sum having been fully paid by Defendant to Plaintiff, this satisfaction may be entered of record with reference thereto. Costs up to this time are to be borne by the Defendant. This satisfaction is without prejudice to plaintiff's appeal on the questions of punitive damages and attorneys' fees.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1398

ZORA H. GILLHAM,
Plaintiff-Appellant,
v.
THE ADMIRAL CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed September 25, 1975.

Before: PHILLIPS, Chief Judge, McCREE, Circuit Judge, and CECIL, Senior Circuit Judge.

McCREE, Circuit Judge. This is an appeal from an order granting a motion for judgment *n.o.v.* setting aside an award of punitive damages and attorneys' fees in a produces liability action brought to recover damages for injuries caused by a fire in a television set designed and manufactured by The Admiral Corporation (Admiral). Two issues are presented for review: (1) whether the district court erred in concluding that no reasonable person could have found that Admiral's conduct in designing and marketing the television was intentional, reckless, wanton, willful or gross so as to justify the award of punitive damages and attorneys' fees; and (2) whether the district court erred in excluding evidence of Admiral's conduct after appellant's injury, offered to show Admiral's state of mind or intent as a predicate for punitive damages.

We hold that the district court erred in granting the motion

for judgment *n.o.v.* because there was sufficient evidence in the record for a reasonable person to conclude that Admiral's conduct permitted an award of punitive damages and attorneys' fees. Accordingly, we need not decide whether evidence of Admiral's conduct after appellant's injury should have been admitted.

Appellant, Zora Gilham, brought this action in the United States District Court for the Southern District of Ohio against appellee, The Admiral Corporation, seeking compensatory and punitive damages for severe burns and other serious and crippling injuries caused by a fire originating in her Admiral color television set. Jurisdiction is under 28 U.S.C. § 1332 based on diversity of citizenship and damages exceeding $10,000 exclusive of interest and costs. The parties agree that the law of Ohio applies.

The issues of liability and damages were tried separately pursuant to Rule 42(b) of the Federal Rules of Civil Procedure. At the conclusion of the liability phase of the trial, the jury found Admiral liable for Mrs. Gillham's injuries. Thereafter, the claims for compensatory and punitive damages were tried to the same jury. The court permitted the question of punitive damages to go to the jury despite Admiral's motion for a directed verdict on this issue. That motion was taken under advisement in accordance with Rule 50(b) of the Federal Rules of Civil Procedure. The jury awarded compensatory damages of $125,000.00, punitive damages of $100,000.00, and attorneys' fees of $50,000.00.

On January 29, 1974, within a month of the conclusion of the trial, the court granted Admiral's motion for judgment *n.o.v.*, setting aside the award of punitive damages and attorneys' fees. In its order, the court stated that the evidence could

> reasonably be interpreted to indicate that the defendant was negligent and even grossly negligent in its design of the television set, in its subsequent activities, and in its failure to warn customers of the potential fire hazard.

It also concluded that Admiral was guilty of a breach of implied warranty.[1] However, it held that Admiral's conduct was not sufficiently reckless, wanton or outrageous to warrant an award of punitive damages.

The facts are not disputed. Mrs. Gillham purchased an Admiral television set with a 24A2 chassis in June 1964. On the evening of November 19, 1968, she watched a television program in her apartment for about an hour, turned the set off, and observed a blue flash come across the television screen, and left the room. She returned to the room about fifteen minutes later to find the television set on fire with flames rising almost to the ceiling. She attempted to beat out the fire with sofa pillows but when she heard an explosion, she called the fire department. She was severely burned by the flames, which had spread to her doorway by the time

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[1] As the opinion later discusses, the Ohio Supreme Court has stated in some of its opinions that unlawful conduct is an element of a cause of action wherein an award of punitive damages is sought. The district court apparently found only that Admiral's conduct lacked the element of willfulness necessary for an award of punitive damages, and did not consider the element of unlawfulness. We observe that the requisite unlawfulness may be found where a defect in a product breaches a warranty imposed by law. *E.g.*., *Craig* v. *Spitzer Motors*, 109 Ohio App. 376, 160 N.E. 2d 537 (1959). In that case, an Ohio court of appeals, in reversing a judgment for the defendant, in an action based upon the seller's misrepresentation of the condition of a used automobile to the purchaser, observed that in Ohio the "obligation of an express warranty is one imposed by law and the action for its breach was originally considered to be in tort." 109 Ohio App. 380. In its opinion, the court also quoted with approval the following statement from 16 Ohio Jurisprudence (2d), Section 146:

> In practically all kinds of contract violations, the courts in Ohio have sought to compensate the injured party, not to reward him. This rule does not obtain, however, in those exceptional cases where the breach amounts to an independent, willful tort, in which event exemplary damages may be recovered under proper allegations of malice, wantonness, or oppression . . . It is true, also that if the breach involves an infraction of a duty imposed by law, it may be thus punished. 109 Ohio App. 380.

she fled the apartment. Burns covered 18.5 percent of her body surface, and 11 percent of her skin was destroyed by third degree burns.

Her burns and the complications resulting from them required her to be hospitalized for 18 months and to have seven operations. The complications attributable to her burns included infection and inflamation of the burns, systemic toxicity, fever, secondary pneumonia, loss of appetite and malnutrition, an acute chronic urinary tract infection, acute pancreatitis, thrombophelbitis, colitis, and a gastrocolonic fistula, which permitted fecal matter to enter her stomach. Her injuries transformed Zora Gillham from an active and vivacious woman into a virtual invalid who requires twenty-four hour nursing care.

In addition to her out-of-pocket expenses of $128,000 for medical care up to the time of trial, the testimony of Dr. William Altemier indicated that as a result of these injuries each year for the rest of her life Mrs. Gillham could be expected to incur medical expenses of $1,000 plus the expenses for full-time nursing care, estimated at $262 per week or $13,624 per year.[2]

The evidence established that the fire in Mrs. Gillham's television set was caused by ignition of the set's high voltage transformer, a component also commonly called a horizontal output transformer (H.O.T.) or "flyback" transformer; that this transformer was defectively designed; that the design created a fire hazard; that that Admiral's officials and designers knew that the high voltage transformer in her set and in other Admiral color television sets of the same model was fire hazardous.

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[2] Appellant's brief suggests that the jury's award of a total of $275,000, while in form including punitive damages and attorneys' fees, was actually intended only as compensatory damages for pain, suffering, and anticipated medical expenses in addition to out-of-pocket expenses of $128,000. This speculation, while interesting, is legally irrelevant.

Admiral began assembling color television sets of its own design in 1963. Its first color television chassis, consisting of all the electronic mechanisms except a picture tube, speakers or cabinet, was designated the "24" series. Mrs. Gillham's Admiral television contained a 24A2 chassis. Dr. Yon, appellant's expert witness, testified that the principal defect making the transformer in this model fire hazardous was the inclusion of unsuitable paper and wax materials. The paper was interleaved between the transformer windings. One wax compound was used to cover the core of the windings and another to cover the secondary windings.

Admiral made only one heat test on each of five transformers before releasing the design for production. These tests showed that the operating temperatures of the transformers ran from 118.2 degrees Centigrade to 126.2 degrees Centigrade. The American Institute of Electrical Engineering Standard Classification of Insulating Materials specifies that the type of paper insulation employed in this transformer may not be used at temperatures in excess of 105 degrees Centigrade. The temperatures recorded in the heat tests also exceeded the "cold flow" point of the wax comound used on the core, which was 115 degrees Centigrade, and came within three degrees of its softening point, which was 129 degrees Centigrade. In addition, the temperatures came within three degrees of 129° C. the cold flow point of the wax comprising the outside covering.

Dr. Yon further testified that exposing paper insulation to excessive temperatures and using wax at temperatures exceeding one cold flow distortion point and closely approaching other cold flow and softening points causes these materials to degrade seriously and to wear out much more quickly than expected in normal use. When the materials degrade, the paper cracks and splits, the wax flows out of the transformer core, and the insulation is destroyed at critical points in the transformer. This condition results in electrical failures causing fires from electrical shorts and electrical arcs, which, in turn,

ignite the flammable paper and wax. This fire hazard, Dr. Yon testified, should have been apparent to any reasonably prudent and qualified design engineer.

The high voltage transformer in plaintiff's television set was designed by Carl Olson, Project Manager of Admiral's Deflection Laboratory with the assistance of subordinates. Mr. Olson admitted at trial that at the time that he designed the transformer he had anticipated that it might catch fire in customers' homes. Therefore, he designed what Admiral calls a high voltage cage, a device enclosing the high voltage transformer and some other components of the high voltage section. The cage was intended to contain the expected fires. There was testimony that Admiral made two tests in which the transformer was set on fire with a torch, and when the cage was closed, it contained the flames. There was other evidence, however, indicating that it was unreasonable to expect that the cage would contain a fire for any length of time because there were 38 holes in the lid of the cage, an opening at the bottom of the cage, and plastic rivets fastening the cover.

Shortly after the television sets containing this transformer were marketed, Olson and Admiral learned that the wax insulation was melting and dripping out of the high voltage cages and even dripping out of the sets. Olson admitted that this information indicated that the transformers were operating at temperatures higher than Admiral had anticipated. Admiral also learned that fires were originating in its 24A2 chassis caused by the high voltage transformer, and that the fires were not being contained in the cage but were igniting the television sets. In some instances, the resulting fires destroyed home furnishings and dwellings, and caused personal injuries.

As early as October 1964 four customers reported to Admiral that fires had occurred in their Admiral color television sets. All four fires were high voltage fires. Thereafter, Admiral received a steady stream of complaints about fires originating in its color television sets. By November 1968 when

plaintiff's fire occurred, at least 91 such fires had been reported to Admiral.

Moreover, in November 1966, two years before the plaintiff's set caught fire, one of Admiral's transformer engineers conducted tests on 16 transformers returned by servicemen to Admiral. Every one of these transformers failed and burned. They all failed and burned in the same manner as the high voltage transformer in Mrs. Gillham's set because the paper and wax insulation failed.

All these transformers were identical in construction and insulation materials to the one in plaintiff's set. The engineer who conducted the tests commented, ". . . the wonder is that more failures did not occur." These tests confirmed customer complaints and demonstrated that many of the fires were caused by the high voltage transformers.

The evidence also disclosed that Admiral could feasibly have reduced this fire hazard substantially, or have eliminated it completely. Materials superior to the paper and wax were available for use as insulation in high voltage transformers long before Admiral designed its transformer in 1963, and these materials were used by other television manufacturers before 1963. Also, Admiral could have installed a fuse in the high voltage circuitry to cut off the electricity in the event of overheating.

The evidence thus demonstrated that when Admiral designed, manufactured and marketed appellant's television set it knew that the set presented a serious fire hazard. Nevertheless Admiral did not warn prospective purchasers or owners of the danger despite the steady flow of reported fires originating in Admiral color television sets. Nor did Admiral redesign this model or step marketing it during the period in question.

The evidence also disclosed that the highest officials of Admiral were aware of the fire hazard and its precise source and cause. I. F. Johnston, Admiral's Electronic Service Manager admitted that he knew that these transformers were the

"major source" of fires in Admiral color television sets. Summaries of the claims against Admiral arising from fires were circulated to and read by President Ross Siragusa, Jr., who kept some of them, and threw others away, but took no action of any kind. Moreover, there was evidence that Admiral officials sough to deceive customers about the fire hazard presented by the color television sets. For example, on July 10, 1967, I. F. Johnston wrote a memorandum about a color television set with a chassis identical to the one in the set owned by Mrs. Gillham:

> We will receive a burned up CD2200 from our Boston Branch which is now approximately 2½ years past warranty.
>
> This set had burned up flyback transformer and it was repaired in our Boston Branch. The customer refused to take the set back but *under pressure and assurance that no more trouble would develop,* finally did so. This transformer was replaced in November 1966.
>
> The set has now not only burned up but also burned the interior of a room and caused considerable damage to the home. The set is being returned here for Lab examination, and we in turn will then forward it to the attention of John Landeck to determine the exact cause of the burning. No doubt lawsuits will follow. [Emphasis added.]

Shortly thereafter, on August 1, 1967, an Admiral field engineer reported a fire caused by an Admiral television set only 17 days after purchase:

> I finally got to inspect the remains of an LN5711 that Gen. Manager John Holmes reported had burned. (See enclosed "C" Report).
>
> This set had really gone, and I understood that a good portion of the customer's house went with it. As near as I can learn it happened about the 23rd or 24th of July after the family had retired for the night. They

were awakened by the family cat, and rushed downstairs to find the TV in flames. By the time they arrived, it was too far gone to do anything but try to save the house, though.

I have no idea how this started. The set was reduced to rubble, and I didn't have the heart to try to call the customer to try to find out more. The set was replaced to him by the Distributor, and I understand his insurance is taking care of the house, and minor burns that the customer suffered getting the TV out.

The record discloses that this was one of seven instances prior to Mrs. Gillham's injury where the fire occurred after the set had been turned off. Some sets burned in dealers' showrooms, even before they were sold. Nevertheless, nine years after Mrs. Gillham's set was marketed, Admiral had not warned its customers of this hazard of which it was fully aware.

Mrs. Gillham contends that the evidence demonstrates that Admiral in designing this television set, in making it available to the public, and in fai'ing to warn prospective customers that the set presented a substantial fire hazard, acted willfully, deliberately, and with a callous disregard for the safety of customers. The willful and deliberate character of Admiral's actions was, she argues, sufficiently reckless and malicious to permit punitive damages under Ohio law.[3]

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[3] As we have already noted, appellant also asserts that the district court erred in excluding evidence including the existence of Admiral's "fire hazard" files relating to the hundreds of fires occurring after her fire in Admiral color sets identical or substantially similar to her set, and certain other evidence showing Admiral's callous disregard for its customers' safety.

She contends that the "fire hazard" evidence would have reinforced appellant's entitlement to punitive damages by showing that Admiral persisted in its reckless disregard of the safety of its customers after her fire, in the face of steadily mounting numbers of fires occurring in Admiral color television sets in customers' homes, and that Admiral perfected and employed techniques and procedures for concealing the existence of the hazard, by making systematic misrepresentations that there was no such hazard and that no fires, or few fires, had ever occurred in its television sets in response to inquiries and complaints of customers.

Appellant also contends that the trial court erroneously excluded evidence of the additional cost of building a safe transformer and erroneously excluded an exhibit in which Admiral, in November, 1969, reported to the National Commission on Product Safety regarding the cost of safety features added to its television sets in the previous two years. Admiral reported that adding a "silicone T.O.T." to its "KIO" chassis increased the cost per unit by only sixty cents, and the same safety feature for its H10, K20, and H12 chassis cost only $1.20 per unit.

Admiral, although apparently conceding that its actions were reprehensible, argues that the district court was correct in refusing to permit the award of punitive damages to stand. It contends that in Ohio punitive damages may not be awarded in the absence of proof that the tortfeasor acted with actual malice, and that this record contains no evidence of malice on Admiral's part. Admiral does not suggest that punitive damages may not, as a matter of law, be awarded in products liability actions, but only that the facts of this case do not permit the implication that Admiral acted maliciously.

In *Columbus Finance, Inc.* v. *Howard,* 42 Ohio St. 178 (1975), the Ohio Supreme Court held that Ohio law required a finding of fraud, insult, or malice to sustain punitive damages, but that "actual malice may be inferred from conduct and surrounding circumstances." 42 Ohio St. 2d 184. The court also specifically approved the following statement:

> intentional, reckless, wanton, willful and gross acts which cause injury to person or property may be sufficient to evidence that degree of malice required to support an award of punitive damages in tort actions. 42 Ohio St. 2d 184.

The court found, however, that punitive damages were not proper in the case before it because there was no evidence from which malice could be inferred. The plaintiff finance

company had repossessed defendants' furniture because of delinquent payments. Although defendants had a receipt marked paid in full, the plaintiff brought suit seeking judgment by confession on cognovit notes signed by defendants. The damages sought were for the deficiency remaining after the sale of the furniture. Because of an erroneous address on the petition, the defendants had no notice of the suit until after a judgment was entered and a bailiff levied execution on the defendants' automobile. While upholding the award for defendants' compensatory damages for wrongful attachment, the court found no evidence of malice to support punitive damages.

Similarly in *Bush* v. *Kelley's Inc.*, 18 Ohio St. 2d 89, 247 N.E. 2d 745 (1969), the Ohio Supreme Court noted that the term malice "has been given many shades of meaning," and approved among others, the statement:

> "It is an established principle of law in Ohio that in actions to recover damages for tort, which involves the ingredients of fraud, malice, or insult, or the wanton or reckless disregard of the legal rights of others, the jury may go beyond the rule of mere compensation of the party aggrieved, and reward exemplary or punitive damages . . ." 16 Ohio Jurisprudcence 2d 281, Section 145. [Emphasis added.] 18 Ohio St. 2d 93.

In *Columbus Finance*, the Ohio court treated *Smithhilser* v. *Dutter*, 157 Ohio St. 454, 105 N.E. 2d 868 (1957), cited by both parties, as an exception to the general rules regarding punitive damages, to be applied in cases involving alienation of affection of a spouse.

Moreover, under Ohio law it is clear that punitive damages may be awarded against a corporation, such as Admiral. *Western Union Telegraph Co.* v. *Smith*, 64 Ohio St. 106, 59 N.E. 890 (1901). In *Western Union*, a suit for wrongful cutting of plaintiff's trees, the court stated that a corporation could be subjected to punitive damages for the tortious acts of

its agents within the scope of their employment in any case where a natural person acting for himself would be liable for punitive damages. *Ranells* v. *City of Cleveland*, 41 Ohio St. 2d 1, 321 N.E. 2d 885 (1975), is not to the contrary. It merely holds punitive damages cannot be assessed against a municipal corporation without specific statutory authorization.

In determining whether the judgment *n.o.v.* was proper the court must view the evidence in the light most favorable to Mrs. Gillham, who secured the jury verdict, and a judgment *n.o.v.* may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence. *Leach* v. *Millers Life Ins. Co.*, 400 F. 2d 179 (5th Cir. 1968), *Teti* v. *Firestone Tire and Rubber Co.*, 392 F. 2d 294 (6th Cir. 1968) (directed verdict). The court of appeals in reviewing the case is also bound by this standard. *Jones & Laughlin Steel Corp.* v. *Matherne*, 348 F. 2d 394 (5th Cir. 1965).

Therefore the question before us is whether no reasonable person, viewing the evidence in the light most favorable to Mrs. Gillham, and drawing all reasonable inferences in her favor, could find that Admiral's conduct was so intentional, reckless,[4] wanton, willful, or gross that an inference of malice

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[4] Application of the rule that punitive damages may be awarded against a tortfeasor who acts in reckless indifference to the safety of others is illustrated in *Gearhart* v. *Angeloff*, 17 Ohio App. 2d 143, 244 N.E. 2d 802 (1969). In that case, a co-owner of a bar sought to evict an unruly patron, and when a scuffle ensued, the other co-owner fired a gun in the direction of the unruly patron and mistakenly grazed the arm of an innocent patron. In affirming the award of punitive damages, the court held, in its syllabus, that "[p]unitive damages may be recovered in an action for negligence where such negligence is so gross as to show a reckless indifference to the rights and safety of other persons." 17 Ohio App. 2d 143. In this appeal, we observe that the district court, in its order granting the motion for the judgment *n.o.v.*, admitted that the evidence could support a conclusion that Admiral had adopted a "cavalier" attitude toward the public safety.

could be drawn. We conclude that the evidence, viewed in light of this standard, was sufficient to permit a reasonable person to conclude that Admiral knew that its design posed a grave danger to the lives and property of its customers, and therefore that its failure to redesign the set or warn the public was conduct sufficiently intentional, reckless, wanton, willful, or gross to permit a reasonable inference of malice.

The record supports the conclusion that Admiral *knew* that its transformers might catch fire because of improper and dangerous design, and that it knew or should have known, even before the set was marketed, that the purported safety device designed to contain the anticipated fires was ineffective. Moreover, the evidence demonstrates that shortly after the set was distributed to the public, and several years before Mrs. Gillham's injury, Admiral was informed that its transformers were causing fires that the safety device was not containing. In spite of this knowledge, and its additional knowledge that its sets were catching fire even when not in use, Admiral neither redesigned the set nor informed purchasers and prospective purchasers of the hazard. It not only continued to distribute the sets, but also misled customers by informing them that the sets were safe.

Accordingly, we conclude that the district court erred in granting the judgment *n.o.v.* The district court although concluding that Admiral admittedly was "grossly negligent," believed that its conduct did not show malice. The district court, however, does not sit as trier of fact *de novo;* its function in deciding this motion for judgment *n.o.v.* was limited to determining whether a reasonable person could arrive at the conclusion agreed upon by the jury. We hold that the jury could reasonably draw the requisite inference of malice from Admiral's conduct. Therefore its award of punitive damages and attorneys' fees was proper under Ohio law.

Reversed and remanded with instructions to enter judgment on the verdict. Costs to appellant.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1398

ZORA H. GILLHAM,

Plaintiff-Appellant,

v.

THE ADMIRAL CORPORATION,

Defendant-Appellee.

JUDGMENT

(Filed September 25, 1975)

Before: PHILLIPS, Chief Judge, McCREE, Circuit Judge, and CECIL, Senior Circuit Judge.

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and remanded with instructions to enter judgment on the verdict.

It is further ordered that Plaintiff-Appellant recover from Defendant-Appellee the costs on appeal, as itemized below,

and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN, Clerk

A True Copy.

Attest:
John P. Hehman, Clerk

Issued as Mandate:

COSTS: To be recovered by Appellant

Filing fee	$ 50.00
Printing	$1394.60
Total	$1444.60

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1398

ZORA H. GILLHAM,

Plaintiff-Appellant,

v.

THE ADMIRAL CORPORATION,

Defendant-Appellee.

ORDER

(Filed November 12, 1975)

Before: PHILLIPS, Chief Judge, MCCREE, Circuit Judge and CECIL, Senior Circuit Judge.

The petition for rehearing with suggestion for a rehearing en banc having come on to be heard, and no judge having requested a vote on the suggestion for en banc consideration, and the petition having therefore been referred to the panel that heard the case, upon consideration, it is ORDERED that the petition be, and it hereby is, DENIED.

Entered by order of the court

/s/ JOHN P. HEHMAN, Clerk